ORIGINAL

Supreme Court, U.S.
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MAR 5 2002
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

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STATE OF DELAWARE,

Petitioner,

vs.

ROGER ATKINSON,

Respondent.

No. 01-942

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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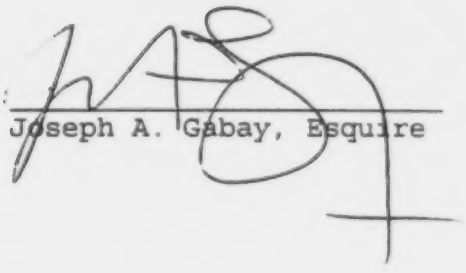
The Petitioner asks leave to file his Brief in Opposition to the Petition for Writ of Certiorari without requiring that the Brief be professionally printed and to proceed in forma pauperis.

Petitioner was previously granted leave to proceed in forma pauperis as a defendant in the Superior Court of the State of Delaware where he was represented by Jerome M. Capone, Esquire, a member of Delaware's Court-Appointed Conflict Attorney Program. On direct appeal his family was able to raise funds to hire private counsel but Mr. Atkinson remains indigent and his family is without further resources to hire counsel to defend this matter.

The undersigned was appointed by the Delaware Courts to handle this matter following the filing of the State's Petition for Writ of Certiorari. Like Mr. Capone I am a member of the Court-Appointed Conflict Program.

12 pp

Petitioner's Declaration in support of this motion is enclosed.



Joseph A. Gabay, Esquire

**IN THE SUPREME COURT OF THE UNITED STATES**

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**STATE OF DELAWARE,**

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**IN FORMA PAUPERIS DECLARATION**

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I, Roger Atkinson, having been duly sworn, do hereby declare that I am the Respondent in the above-entitled case. In support of my Motion to Proceed In Forma Pauperis I hereby aver the following:

1. Because of my poverty I am unable to pay the costs of said proceeding or give security therefore;

2. That I believe I am entitled to be represented in your Court and that the State of Delaware has appointed counsel to represent me;

3. That while I was represented by court-appointed counsel at trial my direct appeal was handled by private counsel due to the money raised by my family. Current counsel was appointed to handle my case following the reversal of my conviction;

4. I am not presently employed and am legally blind;

5. I have been only recently posted bail on the outstanding charge;

6. My only source of income is a disability check of $502.00 which I receive from the Social Security Administration;

7. I own no cash, checking or savings accounts;

8. I own no real estate, stocks, bonds, notes, automobiles or other valuable property;

9. I have children dependent upon me for support.

**I declare under penalty of perjury that the foregoing is true and correct. Executed this 14 day of February, 2002.**

PATRICIA FRY COX
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires Sept. 8, 2002

Notary

**Roger Atkinson**

**ORDER**

**Let the Respondent proceed In Forma Pauperis.**

**JUSTICE**

**IN THE SUPREME COURT OF THE UNITED STATES**

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Respondent.

**No. 01-942**

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE**

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JOSEPH A. GABAY, ESQUIRE
901 Market Street
4th Floor
P.O. Box 590
Wilmington, DE 19899
(302) 655-6434

March 5, 2002

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2001**

---

**STATE OF DELAWARE,**

Petitioner,

**vs.**

**ROGER ATKINSON,**

Respondent.

**No. 01-942**

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Roger Atkinson, respectfully asks this Honorable Court to deny this petition seeking review of the judgment of the Supreme Court of Delaware, which reversed Mr. Atkinson's conviction and sentence on the charge of Attempted Sexual Intercourse in the Second Degree and remanded the case to the Delaware Superior Court for a new trial.

**JURISDICTION**

The decision of the Delaware Supreme Court was entered on July 18, 2001. That decision is officially reported at 778 A.2d 1058 (Del. 2001). Timely cross-motions for reargument were denied August 23, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1257.

## COUNTER-STATEMENT OF THE CASE

On September 20, 1997 Respondent Roger Atkinson, who is legally blind, rode with his estranged wife, Gaylene Atkinson, to a commercial storage facility they rented in Newark, Delaware. Upon their arrival it was learned that Gaylene Atkinson had failed to pay the monthly rent. The staff permitted them to enter the unit anyway and it was there that they began to argue. 778 A.2d at 1060.

Gaylene alleged that upon entering the storage shed Respondent grabbed her by the neck and threatened her with a knife. She further alleged that he forced her to remove her shirt, pants and shoes, but that she was then able to break free and run to the storage facility where 911 was called. 778 A.2d at 1060.

When Gaylene ran into the facility's office both Sherry McCann and James Sloan were present. When asked by McCann if she had been raped she replied that she had not been raped but that Respondent had assaulted her and she feared for her life. Officer Buglio was one of the first police officers to arrive. She did not state to him that there was any sexual component to the assault. 778 A.2d at 1060-1061.

Later that evening she gave a statement to the police, mentioning for the first time that she had been assaulted with the knife and that Respondent had attempted sexual relations. Twice before trial however she changed her statement regarding the alleged sexual assault. Further investigation indicated that Respondent Atkinson was alleged to have forced her to recant and lead to new charges of an Act of Intimidation and Tampering with a

Witness. 778 A.2d at 1061.

Daniel Miller, the Deputy Attorney General originally assigned to prosecute the case, became concerned about the possibility of a further recantation during Gaylene's testimony. In addition to potentially determining whether there would be a basis to admit the prior statement under 11 Del. C. 3507 which permits the affirmative use of a voluntary out-of-court prior statement by a witness who is present and subject to cross-examination. This statute is rare in that it can be used exclusive of the Delaware Rules of Evidence to provide the prior statement with substantive independent testimonial value. Additionally, he clearly sought to interview witnesses McCann, Sloan and Officer Buglio to ascertain if any spontaneous utterances existed which could constitute admissible hearsay as it applied to the allegations of attempted sexual intercourse. 778 A.2d at 1061.

During each of those conversations the witnesses indicated that Gaylene did not mention a sexual component to the alleged assault. McCann and Sloan testified at trial on behalf of the State, but Officer Buglio was not called. 778 A.2d at 1061.

At trial Gaylene was the sole witness to provide oral testimony concerning any alleged sexual assault. The State also relied upon any inferences which might be properly drawn from her physical appearance when she enetered the facility office to call 911. As it penultimate witness the State called Deputy Attorney General Miller at trial to testify about the intimidation and witness tampering charges. During his testimony he referred to his

notes whcih defense counsel was then permitted to review. It was at that time that respondent's trial counsel first saw that McCann and Sloan, both of whom had already testified, had affirmatively discounted the spontaneous utterance theory. He immediately sought a mistrial whcih was denied. 778 A.2d at 1061.

Following deliberations, a New Castle County jury returned guilty verdicts as to the lesser-included offense of Attempted Unlawful Sexual Intercourse Second Degree, two (2) counts of Tampering with Physical Evidence and one count each of Act of Intimidation and Tampering with a Witness. Respondent Atkinson was found not guilty of two (2) counts of Possession of a Deadly Weapon During the Commission of a Felony and one count of Aggravated Menacing. A charge of Possession of a Deadly Weapon by a Person Prohibited was dropped by the State before the case was submitted for deliberations.

Following a timely appeal, the Delaware Supreme Court reversed the conviction of Attempted Unlawful Sexual Intercourse Second Degree and remanded the matter to Superior Court for a new trial. In reaching its conclusion the Delaware Supreme Court found that the actions of the State in failing to timely disclose notes of witness interviews taken by the investigating prosecutor violated Brady v. Maryland, 373 U.S. 83 (1963) and required reversal.

**REASONS FOR DECLINING REVIEW**

In Brady v. Maryland, 373 U.S. 83, 87 (1963) this Court held that a State could not suppress evidence favorable to a

defendant if that evidence is favorable to either guilt or punishment. If a determination is made that the evidence is both favorable and material, then it must be determined whether the delay in providing the information precluded its effective use at trial. Lilly v. State, 649 A.2d 1055 (Del. 1994).

In making its determination the Delaware Supreme Court looked to this Court's decision in Strickler v. Greene, 527 U.S. 263 (1999) to review the meaning of a Brady violation and the role of the prosecutor in our adversarial system of justice. It quoted with favor the inclusion by the Strickler Court the language from Berger v. United States, 295 U.S. 78, 88 (1935) setting forth the special status of a prosecutor.

Here the failure to disclose was not merely a delayed disclosure. Making this matter more egregious was that but for the Deputy Attorney General referring to his notes while testifying, the inquiries made of the three witnesses, McCann, Sloan and Burgio, may have been silenced forever. Because Sloan, McCann and Gaylene Atkinson had already testified, the effective use of those notes was lost forever.

Next is the issue of materiality. As this Court noted in Kyles v. Whitley, 514 U.S. 419 (1995) materiality does not require a showing that the suppressed evidence would have resulted in an acquittal. Rather, the determination is whether the suppressed evidence undermines the confidence in the outcome of the trial. Id. at 434.

Here the Delaware Supreme Court, in its de novo review of

the trial court's actions Jones v. state, 745 A.2d 856 (Del. 1999), determined that Gaylene Atkinson's "credibility on the critical issue of the circumstances surrounding the assault was undeniably central to the case." 778 A.2d at 1063. Under Delaware law effective cross-examination is the means of testing before the jury the believability of the witness and truth of (her) testimony. "Jurors should be afforded every opportunity to hear impeachment evidence that may undermine a witness' credibility." Jackson v. State, 770 A.2d 506, 515 (Del. 2001), citing Fensterer v. State, 493 A.2d 959, 963 (Del. 1985) and Pryor v. State, 453 A.2d 98, 100 (Del. 1982).

In noting that the jury acquitted Respondent Atkinson of the weapons offenses despite the testimony of Gaylene Atkinson that he had used a knife against her, the Delaware Supreme Court found that those factors, combined with the disclosure only upon order of the trial court, require the conclusion that there is a "reasonable probability of a different result" had the favorable evidence been provided in a timely fashion. 778 A.2d at 1063, 1064.

Thus, any decision by this Court would be limited and defined by the peculiar facts of this case, and would have dubious applications to other cases.

Essentially the State of Delaware comes to this Court seeking error correction. However, it has been long established that this Court "do[es] not grant a certiorari to review evidence and discuss particular facts." United States v. Johnston, 268 U.S. 220, 227 (1925), for its "certiorari jurisdiction is designed to

serve purposes broader than the correction of error in particular cases." Watt v. Alaska, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). See also Ponte v. Real, 471 U.S. 491, 501-502 (1985) (Stevens, J., concurring) ("The merits of an isolated case have only an oblique relevance to the question of whether a grant of certiorari is consistent with the sound administration of this Court's discretionary docket.").

In opposing the State of Delaware's Petition, Respondent Atkinson asserts that not only was the decision below correct but that additionally, this case is a singularly inappropriate vehicle for consideration of the question presented by the petition.

## CONCLUSION

The Petition for a writ of certiorari should be denied since it does not present any substantial reason which requires this Court to review the decision of the Supreme Court of Delaware.

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Dated: March 5, 2002